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Nos. 01-1118, 01-1119

In The

Supreme Court of the United States

Joseph Scheidler, et al.,

Petitioners,

v.

National Organization for Women, Inc., et al.,

Respondents.

Operation Rescue,

Petitioners,

v.

National Organization for Women, Inc., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Motion of Life Legal Defense Foundation to File Brief as Amicus Curiae and Brief in Support of Petitioners

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25 pp

Motion For Leave To File Amicus Curiae Brief
In Support Of Petitions For Certiorari

Life Legal Defense Foundation, a California non-profit corporation, hereby moves for leave of this Court to file an amicus curiae brief in support of petitions for certiorari filed by Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc., and Petitioner Operation Rescue. All petitioners have consented to Life Legal Defense Foundation's request to file an amicus curiae brief. Respondents, however, have withheld consent, claiming without having seen any amicus brief that it would address issues beyond those raised by the petitions.

As its name suggests, Life Legal Defense Foundation (LLDF) provides legal assistance to pro-life advocates most often to ensure respect for their lawful First Amendment-protected activities, including public protest, leafleting, counseling and picketing near abortion facilities. LLDF is especially concerned that this Court grant the petitions for certiorari and thereafter review and reverse a Seventh Circuit decision which otherwise threatens thousands of social activists with the specter of civil R.I.C.O. liability including treble damages and nationwide injunctions for their exercise of free speech and assembly rights. Particularly alarming to LLDF is the failure of the trial court and the Seventh Circuit to take steps to ensure the trial judge's injunction order satisfied the rigorous standards of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Petitioners have addressed at length the failure of the trial court to ensure the jury verdict did not impose civil liability for damages based on guilt by association and that the scope of relief be closely tailored to the unprotected conduct. But these same failings are present in the trial court's injunction order. The holding in *Claiborne*, of course, is not limited to damage claims but applies equally to injunctive relief.

The trial court's and Seventh Circuit's inattention to the *Claiborne* standards has resulted in the issuance of a permanent injunction of nationwide reach which purports to reach to individuals

acting "in concert" with Petitioners who violate the injunction without Petitioners' inducement, direction, or involvement. Not only does such a holding offend *Claiborne*, but it conflicts with the repeated rulings of this Court holding that no court has the power to enjoin the acts of non-parties to an *in personam* proceeding unless such persons knowingly and purposefully aid and abet a named party to violate the injunction.

Also of concern to LLDF is the trial court and Seventh Circuit's failure to observe *Claiborne*'s requirement that the relief afforded be narrowly tailored to address unprotected conduct rather than "non-violent, protected activity."

LLDF fears that the Seventh Circuit's remarkably loose interpretation of the Hobbs Act will be used to silence the pro-life movement and other social protest groups.

Life Legal Defense Foundation, therefore, respectfully requests that it be granted leave to file the following brief as *amicus curiae* in support of the petitions for certiorari.

Respectfully submitted,

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Interests Of Amicus

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By 1991, most of these pro-life advocates had turned to other entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at appropriate locations, including abortion facilities. Rather than applauding this conversion to lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '8os and the lawful protest of the '9os. They consider both to be unlawful interference with, and harassment of, women seeking abortions. The only difference is that the civil disobedience of the '8os occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily—and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, in the early to mid-'9os, many abortion providers sought injunctions against pro-life picketers. *See infra*, Section III.

The abortion providers soon realized that the most effective way to seek injunctive relief was to invoke the name "Operation Rescue", a group notorious for civil disobedience and "rescues" in the '8os. One or two "rescues" in an abortion facility's or a defendant's past was frequently the key to obtaining an injunction

restricting lawful picketing.[1] To this day, abortion providers and supporters gather and maintain data on who is "associated" with Operation Rescue, meaning who of today's peaceful picketers participated in a blockade or went to an Operation Rescue rally ten years ago.

Amicus LLDF fears that the nationwide R.I.C.O. injunction issued in *NOW v. Scheidler* or to be issued by courts emboldened by the Seventh Circuit's affirmance in that case will be used, or abused, by abortion providers to intimidate pro-life speakers because of their past participation with Operation Rescue[2] or Pro-Life Action Network ("PLAN"), or to intimidate them from future involvement with these groups, or even groups that associate with these groups, in completely lawful First Amendment protected activities. Involvement in *lawful* protest activities with any "Operation Rescue" entity, at abortion facilities or elsewhere, might be deemed sufficient to bring someone within the scope of the injunction. Thus, not only the "rescuer" from days gone by, but the person who, for example, lawfully distributes leaflets at a school in conjunction with Operation Rescue or PLAN today may find herself subject to the jurisdiction of the United States District Court for the Northern District of Illinois or any other court which issues a nationwide injunction under R.I.C.O. to private litigants. LLDF is gravely concerned that "guilt by association" will be the rule of the day in courts bound to or inclined to follow the Seventh Circuit. Leaders of pro-life organizations (or any social movement for that matter) lawfully engaged in social protest will be silenced for fear they will be held liable if any

[1] See, e.g., *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal.App. 4th 290 (1996), cert. denied, 522 U.S. 811.

[2] Respondents apparently intend just such a result: "In addition to the co-conspirators listed in Exhibit B, there are hundreds or thousands of unidentified co-conspirators who have joined forces with the R.I.C.O. defendants to commit racketeering activity aimed at closing clinics that perform abortions." Plaintiff's Amended R.I.C.O. Case Statement, S. App. 378, 381. In Respondents' view, co-conspirators also include anyone who attended a PLAN meeting and then committed an illegal act in furtherance of the conspiracy. Tr. 2237:25-2238:22.

of their followers engage in independent acts which go beyond lawful protest.

I. The Nationwide Private R.I.C.O. Injunction Affirmed By The Seventh Circuit Creates Intolerable Conflicts And Will Invite Forum-Shopping

As discussed at length in the petitions of the parties, the Seventh Circuit decision permitting private civil litigants to obtain injunctive relief under R.I.C.O. directly conflicts with that of the Ninth Circuit in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The Ninth Circuit conducted a thorough examination of the text and legislative history of R.I.C.O. and determined that the remedy available to private plaintiffs was limited to treble damages. This decision has been followed in subsequent Ninth Circuit cases, as well as in cases in other circuits. See Petition for Writ of Certiorari, No. 01-1119, at 11, n. 17.

Although the Ninth Circuit has decided that private injunctive relief is not available under R.I.C.O., the Seventh Circuit's decision affirms a private R.I.C.O. injunction which purports to be operative throughout the country, including the Ninth Circuit. Worse than a mere conflict among circuits, the nationwide reach of the private injunction creates an intolerable scenario: although a plaintiff could never obtain such relief in the Ninth Circuit, a plaintiff who obtains his private R.I.C.O. injunction in a district court in the Seventh Circuit can enforce it against defendants and those acting in concert for acts and omissions within the Ninth Circuit. The confusion created by this situation will be increased when the plaintiffs or any "federal, state, or local law enforcement authority" seek to enforce the injunction in district courts within the Ninth Circuit, as permitted in the terms of the injunction itself.

Thus, there is a particularly pressing need for this Court to resolve this conflict. A decision is necessary not only to provide uniformity in the application of the law, but to prevent the forum

shopping and confusion which will necessarily ensue if R.I.C.O. plaintiffs are allowed to obtain injunctive relief in one circuit which will be effective in another circuit in whose courts private R.I.C.O. injunctive relief is held to be beyond the jurisdiction of the court to grant.

This Court and other courts have long complained about private litigants' manipulation of R.I.C.O. to work the intimidation the heavy hammer of treble damages and attorneys' fees can provide. This Court and many appellate courts have had to cope with the virtually unlimited creativity of lawyers in transforming garden variety business conflicts into complex civil R.I.C.O. actions. One can only imagine what private litigants and their attorneys will plead if they believe they can transcend the jurisdictional bounds of state courts' equity powers and obtain a *nationwide* injunction and a right to recover attorneys' fees to boot.

The permanent R.I.C.O. injunction issued in *NOW v. Scheidler* involves more of the same stretching of R.I.C.O. far beyond Congress' intent. Not surprisingly, the R.I.C.O. injunction issued exceeds the relief allowable under R.I.C.O. That injunction does not enjoin R.I.C.O. violations. Rather it enjoins the commission of predicate offense which any state court could do as well but for the jurisdictional limits posed by state lines.

The jurisdiction afforded to district courts under R.I.C.O. is limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operating any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of the

predicate offenses which may give rise to a "pattern of racketeering activity" is not prohibited by R.I.C.O. since the predicate offenses are crimes in themselves.

Hence a district court's authority to issue injunctive relief under R.I.C.O. is limited to the prevention of R.I.C.O. violations, i.e., violations of section 1962. Injunctive relief is not authorized under R.I.C.O. merely to prevent the commission of predicate offenses, since state courts are presumably capable of enjoining the commission of crimes. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under R.I.C.O. include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Except for the boilerplate prohibition on "operating an enterprise," the instant injunction does not prevent and restrain R.I.C.O. violations, i.e., violations of section 1962, but instead purports to enjoin the commission of acts which Respondents contend constitute predicate offenses, namely, violations of the Hobbs Act. If the injunction were intended to prevent or restrain R.I.C.O. violations it must necessarily identify the "enterprise" which is the subject of the R.I.C.O. violation. The instant injunction is not a legitimate exercise of authority under R.I.C.O. but instead appears to use vague R.I.C.O. terminology to obtain a nationwide injunction to restrain conduct which a state court already has the power to do. Cf. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (Enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members

and associates of organized crime for any commercial purpose was within scope of R.I.C.O.'s civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers, et al.*, 871 F.2d 401 (3d Cir. 1989) cert. denied, 493 U.S. 953 (1990) (Individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

The prohibition on "operating an enterprise," central to the maintenance of federal court jurisdiction, cannot be treated as a superfluity or "boilerplate." It should have been carefully and explicitly defined to ensure those charged, or who may be charged, with responsibility to comply understand what is—and is not—prohibited.

To allow the Seventh Circuit's decision to go unreviewed will result in a major conflict among the circuits and encourage plaintiffs to contrive a civil R.I.C.O. violation to obtain federal jurisdiction and obtain a nationwide injunction which enjoins nothing more than the commission of predicate offenses, e.g., violations of state and federal crimes, which any state court could do in equity.

II. The Injunctive Relief Does Not Satisfy The Exacting Standards Of *NAACP v. Claiborne Hardware Co.* And The Lower Court's Decision Conflicts With The Decisions Of This Court And Other Circuits On The Binding Effect Of Injunctions On Non-Parties

As Petitioners note, the Seventh Circuit's holding is inconsistent in several ways with this Court's unanimous decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Though *Claiborne* involved an award of damages, this Court's holding in *Claiborne* was not limited to damages analysis. Rather, the Court in *Claiborne* looked foremost to the imposition of liability. Damages are only one form of remedy for liability. Injunctive relief is another. This Court expressly noted in *Claiborne* that the same exacting standards it insisted be applied to any trier of facts' imposition of liability and awarding of damages are applicable to the trier of fact's determination of liability and injunctive relief. *Id.* at 924, n. 67.

Thus, Petitioners' complaint that the Seventh Circuit failed to observe the *Claiborne* holding in its affirmance of liability and treble damages, applies as well to the Seventh Circuit's affirmance of the permanent injunction. The same defects in the jury instructions which did not require any linking of the Petitioners with the commission of predicate acts by others associated with PLAN, for example, are present in the trial court's order issuing the permanent injunction.

The Seventh Circuit's nonchalance about the very real possibility that the jury viewed the instructions as an invitation to find guilt by association is manifest in the Seventh Circuit's interpretation of the breadth of the permanent injunction to restrain the independent acts of non-parties who belong to the same association as did the Respondents.

It is settled law that a court has no power to enjoin acts of non-parties to an *in personam* proceeding, except where such persons are knowingly and purposefully aiding and abetting a named party to violate the injunction. Fed.R.Civ.P. 65(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934) (reversing order which "assumed to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (courts may not grant an injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"; principle of applying injunctions to nonparties is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"); *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 112 (1969) (reversing post-judgment entry of injunction against non-party who was not shown to be in concert or participation with named parties); *Alemite Manu-*

facturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.); *U.S. v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In stark contrast, however, the Seventh Circuit interpreted the reach of the district court's injunction to encompass the independent acts of non-parties: "If individuals acting in concert with the defendants or PLAN violate the injunction, ***without inducement or direction by the defendants***, the violators, ***not the defendants***, would be in contempt of the court's order." Appendix to Brief of Petitioner Operation Rescue at 31a (emphasis added).

The Seventh Circuit thus created a previously unheard-of category of potential contemnors, i.e., persons closely associated enough with the defendants to be bound by the terms of the injunction, but not so closely associated as to be acting with the "inducement or direction" of the defendants. Such a category is a legal and logical impossibility:

> "[T]he only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, ***but what it has the power to forbid, the act of a party***. This means that the respondent must either abet the defendant, or must be legally identified with him."

Alemite, *supra*, 42 F.2d at 833 (emphasis added). More recently, in an abortion protest case, the Second Circuit citing *Alemite* held:

> In order for a court to hold a nonparty respondent in contempt of a court order, '***the respondent must either abet [the party named in the order], or must be legally identified with him.***' [citation omitted.]. . . . An injunction issued against a corporation or association binds the agents of that organization ***to the extent they are acting on behalf of the organization***. [citation omitted.] Generally, persons who cease to act in one of the designated capacities are no longer bound by the decree."

People v. Operation Rescue National, et al., 80 F.3d 64, 70 (2d Cir. 1996) (emphasis added).

The Seventh Circuit's holding that non-parties could be held in contempt without the defendants also being held in contempt conflicts with long-established case law on the subject of non-party contemnors: "[A] key principle in cases binding a nonparty who is not legally identified with a party is that a person properly named in the injunction must have had a material role in the subsequent violation of that injunction." *G.&C. Merriam Co. v. Webster Dictionary Co. Inc.*, 639 F.2d 29, 35 (1st Cir. 1980). *See also United Pharmacal Corp. v. U.S.*, 306 F.2d 515, 517-18 (1st. Cir. 1962) ("if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated"); *Herrlein v. Kanakis*, 526 F.2d 252, 254 (7th Cir. 1975) ("Since neither [named party] was found in violation of the order, [non-party] cannot be held liable as an aidor or abettor of the named parties in violating the injunction").

This element of third-party liability, i.e., the required joint liability of an enjoined party for any contemptuous act, acted as a brake on an overly expansive interpretation of "acting in concert." By disposing of this element, the Seventh Circuit has redefined the phrase "acting in concert" to mean mere association with an enjoined party, or, more simply put, guilt by association. The injunction is thus loosed from its moorings of prohibiting unlawful racketeering-related acts by the named defendants, and becomes instead a means of intimidating individuals from associating with the enjoined parties (which include organizations of alleged nationwide reach, according to the plaintiffs) in *any* activity, lest they come under the jurisdiction of the court as persons "acting in concert" with the parties.

The Seventh Circuit evidently did not consider the chilling effect on the exercise of legitimate acts of protest created by the fact that "prosecutorial discretion" for enforcement of the district court's order rests in the hands of bitterly opposed ideological opponents. These opponents may enforce the injunction themselves through civil contempt proceedings in the district court,

compelling anyone in the country to appear in the District Court for the Northern District of Illinois. All that is necessary to establish the personal jurisdiction of the court is for the plaintiffs to serve that individual with an order to show cause and *allege* that the individual is "in concert" with PLAN or one of the named defendants through mere association.

By affirming the order of injunction, the Seventh Circuit failed to restrain the impermissible reach of the injunction's power over innumerable individuals and organizations not before the court. LLDF's concerns about application of the injunction to these persons cannot be swept aside with the axiom that, as long as one obeys the law, one has nothing to worry about. Compelling or even threatening to compel an individual to defend himself or herself in a distant jurisdiction is itself a burden on freedom of expression and association.

The Seventh Circuit's holding that a nonparty may be bound by the injunction by mere association with named parties creates a conflict with the decisions of this Court and other circuits which by itself warrants the granting of the petition for certiorari. That holding highlights the Seventh Circuit's inattention to the exacting requirements of *Claiborne*.

III. The Seventh Circuit's Cavalier Reading Of R.I.C.O. To Permit Imposition Of A "Nationwide Injunction" On Behalf Of Private Plaintiffs Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts

Petitioners are not the first parties to have been awarded injunctive relief against abortion protests. Rather, their only claim to distinction is the length of time it took them to secure an injunction. During the thirteen years this action was pending in the District Court, scores of injunctions involving anti-abortion protesters have been issued by state and federal courts in other jurisdictions.

Amicus is aware of over 30 actions filed in California alone since 1985, all seeking injunctive relief against anti-abortion protests. In some of these actions, the plaintiff abortion providers were completely or partially successful.[3] In other actions, they failed to obtain relief and the action was dismissed.[4] At least two injunction actions are pending at this time in California.[5]

Many of these actions, both within and without California, included "Operation Rescue" as a defendant.[6] Outside California: *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989), aff'd in part and rev'd in part, 919 F.2d 857 (3d Cir. 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F.Supp. 230 (D.Nev. 1989); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991);

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[3] See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal.4th 1009 (1995) cert. denied, 117 S.Ct. 1285 (1997); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal.App. 3d 1662 (1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal. App.4th 290 (1996) cert. denied, 522 U.S. 811 (1997).

[4] See, e.g., *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue, et al.*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *EDP v. Vargovcik, et. al.*, (L.A. Super. Ct. No. BC 092929) (filed 11/93).

[5] *Wilkerson, et al. v. Scott, et al.* (San Diego Super. Ct. No. 728883) (filed 3/99); *Foti v. Planned Parenthood* (San Mateo Super. Ct. No. 405649) (cross-complaint filed 9/98).

[6] Inside California: *Feminist Women's Health Center v. Blythe*, 32 Cal.App. 4th 1641 (1995) cert. denied, 116 S.Ct. 514 (1995); *National Abortion Federation v. Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) rev'd 8 F.3d 680 (9th Cir. 1993); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F.Supp. 617 (N.D. Cal.); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*, 50 Cal. App.4th 290 (1996) cert. denied 522 U.S. 811 (1997); *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *Dym v. White*, (San Diego Super. Ct. No. 670970) (filed 11/93); *Redding Feminist Women's Health Center v. Operation Rescue* (Shasta County Super. Ct. No. 112314) (filed 11/94).

Arcadia Women's Health Center v. Operation Rescue, 929 F.2d 530 (9th Cir. 1991); *Women's Health Care Services, P.A. v. Operation Rescue—National*, 773 F.Supp. 258 (D.Kan. 1991), aff'd in part and rev'd and remanded in part, 24 F.3d 107 (10th Cir. 1994); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *National Organization for Women v. Operation Rescue*, 726 F.Supp. 300 (D.D.C. 1989), 747 F.Supp. 760 (D.D.C. 1990); *National Organization for Women v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va. 1989), aff'd 914 F.2d 582 (4th Cir. 1990) (per curiam), reversed sub nom. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). In the instant case, Respondents strenuously rejected any attempt by defendants to distinguish between various entities or associations bearing the name "Operation Rescue," instead insisting that all such organizations were subsumed in the one defendant Operation Rescue. See, e.g., Tr. at 1296:14-1298:21; 1299:23-1300:5; 3152-3155. The Permanent Injunction issued by the court names "Operation Rescue, a/k/a Operation Rescue National" as the enjoined party. Appendix to Brief of Petitioner Operation Rescue at 270a. Assuming *arguendo* that all anti-abortion entities bearing the name "Operation Rescue" are indeed one and the same, then the same defendant sued in this action by the class of "all women's health centers in the United States which perform abortions" has over the past decade been repeatedly sued by individual women's health centers in numerous other actions.[7] These actions all arose out of the same conduct or course of conduct which was the subject of the lengthy litigation in the instant case.

[7] Because the lower court in the instant action placed under permanent seal the names of the clinics which were included in and which opted out of this class action, Amicus has no way of knowing how many of the clinics in these subsequent lawsuits are also included in the Clinic Class. However, as Respondents represented to the court that only 11 clinics had opted out, it is clear that many of these clinics which sued Operation Rescue individually were also part of the Clinic Class in this action.

The most intriguing example of the abortion provider's "two bites at the apple" approach is the case of *National Abortion Federation, et al. v. Operation Rescue, et. al.*, No. CV 89-1181 (AWT) (C.D. Cal.) (filed 3/1/89) (hereinafter "*NAF v. OR*"). In that case, plaintiffs included not only the National Abortion Federation (representing its 48 member clinics in the state of California) but thirteen other California abortion providers or affiliates of California abortion providers.

In *NAF v. OR*, plaintiffs proposed the certification of two classes: 1) all women who seek medical care from family planning and abortion service providers and are deprived of that care by defendants' actions, and 2) all family planning clinics, abortion and other gynecological care providers and women's clinics which are unable to provide care because of the defendants' action. Complaint, ¶22.[8] Included among the defendants was "Operation Rescue," identified as "an unincorporated association with office in Binghamton, New York and Garden Grove, California." *Id.*, ¶ 28. Plaintiffs subsequently named Randall Terry as Doe 1, *Id.* at ¶ 33.

The most specific allegations in the complaint dealt with two blockades occurring in Los Angeles on February 11, 1989, at the Westside Women's Medical Clinic and the Pico Women's Medical Clinic. Complaint, ¶¶ 41-45. This is the very same blockade about which Respondents presented extensive testimony at the trial in the instant matter. Tr. 1329-1366; 1514-1526.[9] Indeed, one of the class representative plaintiffs in *NAF v. OR*, Carolyn Thompson, is none other than the witness who testified as the plaintiffs-Appellees' Third Anonymous Witness in the instant action.[10]

[8] For the convenience of the Court all the pleadings and orders in *NAF v. OR* referenced in this brief have been lodged with the Court.

[9] See Tr. at 1515 for identification of date and location of the incident.

[10] See Complaint ¶45: "One woman, who was scheduled for a post-operative appointment for follow-up examination following a hospitalized abdominal surgery, had to be treated on an emergency basis at an alternative location. Although this

On March 2, 1989, plaintiffs NAF, et al., moved for and were granted a temporary restraining order prohibiting trespass, blocking, and physically abusing persons entering or leaving abortion facilities. *See* Temporary Restraining Order.

Plaintiffs NAF, et al., subsequently filed a motion for contempt findings against several individuals, including Defendant Joseph Scheidler and various individuals associated with Operation Rescue, based in part on a blockade which occurred in at the Chico Feminist Women's Health Center on March 11, 1989. On March 13, 1989, the plaintiffs filed declarations from Dido Hasper and Penny Bertsch which stated that hundreds of copies of the federal temporary restraining order were served on participants in the blockade. *See* Supplemental Exhibits in Support of Request for Civil Contempt Fines.

In the instant case, Respondents called these same two witnesses, Dido Hasper and Penny Bertsch, to testify about this same blockade. These witnesses never mentioned in their testimony that a federal temporary restraining order (obtained in *NAF v. OR*) was served on all participants at the March 11 blockade. In fact, in response to a question from defense counsel about whether they had already filed a lawsuit (*NAF v. OR*) to get an injunction against that protest, Ms. Hasper testified: "No. We had filed—an attorney for us had filed a lawsuit to get an injunction against the regular protestors who were in front of the clinic. We had no idea that 500 or 400 people from Operation Rescue were going to drive up from Sacramento on that day. *So we had nothing against them.*" Tr. at 1429:25-1430:7 (emphasis added).

Chico Feminist Women's Health Center was already at the time of this incident a named plaintiff in *NAF v. OR*. Complaint

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woman, plaintiff Carolyn Thompson, informed the blockaders that she was not pregnant and did not seek an abortion, defendants still prevented her from obtaining necessary medical care." Strangely, the *NAF v. OR* complaint, filed less than three weeks after the incident, does not contain any allegations of violence similar to which the Third Anonymous Witness testified to at trial in the instant matter. Tr. 1518-21.

¶ 8. It immediately sought an adjudication of contempt for violation of the court order issued in that case. Nonetheless, the district court in the instant action relied on evidence of this blockade as grounds, ten years later, for issuing further relief in the form of a nationwide injunction. *Id.* at ¶ 4.

On March 15, 1989, plaintiffs NAF et al. were granted a preliminary injunction. A copy of this injunction, which is still in effect, is lodged with the Court. See footnote 8 *supra*.

Before plaintiffs in *NAF v. OR* could move for certification of the classes, however, defendants moved to dismiss the case for failure to state a claim under 42 U.S.C. § 1985(3), plaintiffs' only federal claim. The court granted the motion with leave to amend, 721 F.Supp. 1168 (C.D.Cal. 1989), and, after plaintiffs' amendment, granted a subsequent motion to dismiss without leave to amend.[11] Plaintiffs appealed the dismissal, and sought and were granted a stay of the order dissolving the preliminary injunction, pending expedited appeal.

In 1993, the Ninth Circuit reversed the order dismissing the suit and remanded the case to the district court. *NAF v. OR* 8 F. 3d 680. Defendants filed a petition for rehearing, which was denied in 1994. The case was then remanded to the district court, where the preliminary injunction now continues to pend, no trial having ever been conducted.

Thus, for over 12 years, there has been and continues to be an enforceable federal court order enjoining Operation Rescue from trespass, blockades, and physical harm in the state of California. Two of the five incidents singled out for mention by the lower court in issuing the injunction in this case, Appendix to Brief of Petitioner Operation Rescue at 236a-257a, were also used as the basis for injunctive relief in *NAF v. OR*.

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[11] The motion was granted on substantially the same grounds relied on by the U.S. Supreme Court four years later in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

The example of *NAF v. OR* highlights the inappropriate, duplicative nature of the "nationwide" injunction issued by the lower court. Not only is such broad relief unnecessary, but it unfairly subjects the defendants (and those "in concert" with them) to the threat of multiple contempt actions arising from the same incidents of allegedly contemptuous conduct, mirroring the redundant lawsuits to which the defendants have already been subjected.

It behooves this Court, therefore, to carefully review whether Congress when enacting R.I.C.O ever intended to afford private litigants the right to nationwide federal injunctions when the conduct they seek to enjoin could be sought in and granted by state courts, which also have the advantage of local perspective and proximity to the witnesses and parties traditionally required of equity courts.

Vesting federal courts with the power to issue nationwide injunctive relief will not only seriously alter the relationship of state and federal courts, it will result in conflicting, overlapping and duplicative injunctions and multiple contempt proceedings for single violations. This is especially pernicious where the injunctive relief impinges on the exercise of protected First Amendment rights.

Conclusion

The petitions for certiorari should be granted. The Seventh Circuit's decision creates intolerable conflicts among the circuits on fundamental jurisdictional issues. Worse, by ignoring *Claiborne*, the nationwide injunctive relief affirmed by the Seventh Circuit allows "in concert" liability for non-parties to be predicated on nothing more than guilt by association. To allow ideological adversaries the opportunity to invoke R.I.C.O. and obtain nationwide injunctions against leaders of social movements engaged in legitimate protest activity for their followers' independent and unprotected conduct will freeze, not merely chill, the exercise of First Amendment rights.

Respectfully submitted,

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